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79-1356

In the Supreme Court of the United States

OCTOBER TERM, 1979

KATHY SUE JOHNSON, etc. et al., and DARCEL MILTON, etc. et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Introductory Statement	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	11
1. The Issues in this Case Are of Extreme Importance	11
2. The Decision Below Conflicts in Principle with the Decisions of this Court and Other Courts	15
Conclusion	18
Appendices:	
A. Opinion of the Court of Appeals	A-1
B. Court of Appeals Order Denying Rehearing	A-29
C. Judgment Order of the District Court	A-31
D. Findings of Fact and Conclusions of Law by the District Court	A-33
E. Order of the District Court on Attorneys Fees	A-50

TABLE OF CITATIONS

CASES:

PAGE

Arvizu v. Waco Independent School District, 495 F.2d 499 (5th Cir. 1974) 16

Brice v. Landis, 314 F.Supp. 974 (N.D. Cal. 1969) 17

Brown v. Board of Education, 347 U.S. 483 (1954) 12, 14

Clark v. Board of Education, 449 F.2d 493 (8th Cir. 1971), *cert. denied,* 405 U.S. 936 (1972) 16

Haney v. County Board of Education, 429 F.2d 364 (8th Cir. 1970) 17

Korematsu v. United States, 323 U.S. 214 (1944) 14

Lee v. Macon County Board of Education, 448 F.2d 746 (5th Cir. 1971) 16-17

McLaughlin v. Florida, 379 U.S. 184 (1964) 13

Moss v. Stamford Board of Education, 350 F.Supp. 879 (D. Conn. 1972) 17

NAACP v. Lansing Board of Education, 559 F.2d 1042 (6th Cir.), *cert. denied,* 434 U.S. 997 (1977), *aff'g,* 429 F. Supp. 583 (W.D. Mich. 1976) 17

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 17

United States v. Carolene Products Co., 304 U.S. 144 (1938) 14

United States v. Scotland Neck Board of Education, 407 U.S. 484 (1972) 13

University of California Regents v. Bakke, 438 U.S. 265 (1978) 13, 15

CONSTITUTIONAL PROVISION:

PAGE

Amendment XIV, Section 1 2

STATUTES:

20 U.S.C. §1617 8

20 U.S.C. §1703(c) 3, 16

42 U.S.C. §1981 16

42 U.S.C. §1983 ..... 3, 16

42 U.S.C. §1988 8

42 U.S.C. §2000d 16

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INTRODUCTORY STATEMENT

Petitioners respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 604 F.2d 504, and the unreported findings of fact and conclusions of law of the District Court, are reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1979. A timely petition for rehearing and rehearing *en banc* was denied on December 6, 1979, and this petition for *certiorari* was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Can the annual exclusion *solely* on account of race of hundreds of black children and not a single white child from two integrated high schools be justified by a school board's stated purpose of preventing white flight, where the program effectively denies an integrated education to most of the black children who are excluded?

2. Does a school board's alleged purpose to preserve two schools as integrated either (a) justify an explicit racial classification which imposes the burdens exclusively on black children, or (b) preclude strict judicial scrutiny of the actual purpose and effect of the classification or the board's failure to adopt less discriminatory alternatives which equalize the burdens between blacks and whites?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, Section 1:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

20 U.S.C. §1703(c):

> "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> > "(C) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;"

STATEMENT OF THE CASE

At issue in this case is the legality of racial quotas allegedly designed to preserve racial balance at two schools in a generally segregated school system, where those quotas place the entire burden of integration on blacks and none on whites.

The Background of the Quota Plans

Public schools in the City of Chicago are principally organized on a neighborhood school basis, and exhibit a pattern of substantial segregation. In 1976, for example, 79% of Chicago's public elementary schools and 67% of its public high schools had student bodies which were more than 85% majority or minority (Pl. Ex. 2). Despite considerable pressure from the Illinois State Board of Education to eliminate segregation, the Chicago Board has refused to adopt any mandatory measures to desegregate.*

The racial quotas involved in this case were adopted at two public high schools on Chicago's far south side—Gage Park High School and Morgan Park High School. The attendance areas for these schools are generally speaking located between the all-black inner city schools to the east, and predominantly white schools to the west. (Pl. Exs. 2, 36).** Although racial quotas are applied to certain special "magnet" schools which are not operated on a neighborhood basis, black children living in the Morgan Park and Gage Park areas are the *only* children in the City of Chicago excluded from their neighborhood schools on account of their race. (*Johnson,* R. 9, ¶18 at 10-11).

The racial quota for Gage Park High School was adopted by Respondents in May, 1975, and established a 48% black, 42% white, 8% Hispanic and 2% "principal's option" school-wide quota for the school. The Morgan Park quota,

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* These facts are generally known in Chicago and are set forth in the Chicago Board's Report, *Access to Excellence, Recommendations for Equalizing Educational Opportunity,* at xv, xix, which both parties cited to the Court of Appeals.

** These white schools are Kelly (78.1% white in 1976), Kennedy (89% white), Bogan (97.4% white), Hubbard (93.4% white), and Curie (76% white) (Pl. Ex. 2).

adopted the following year, established a 50% black —50% white quota for each entering class. The quotas were adopted over the express and determined opposition of the black community (Pl. Ex. 74 at 40-42, 44-47) (Morgan Park), and the specific ratios were selected at the urging of the white community. (Def. Ex. 35, at 29, 37) (Gage Park). In each case, the Board's *stated* purpose for the quota was to reduce overcrowding and prevent increasingly black enrollments. (A-36, ¶12). As the District Court explicitly found, the ceiling on black enrollments was necessarily set at a lower level than that at which blacks would have been admitted but for the quotas. (A-36, ¶12). The quotas were thus designed to exclude black children from Morgan Park and Gage Park High Schools.

The quotas had their intended effect. In three years, over 1630 black children were excluded, and not a single white child. (A-47, ¶42). In fact, the admission of every white child was apparent from the moment the quota results were first announced. (A-37 to A-39, A-45). The quota plans also achieved their objective of attaining the prescribed quota levels, since increasing numbers of black children were excluded each year until the quota levels were satisfied. (See A-40, ¶26). However, there was no evidence that the quota plans were effective in reversing the decline in white enrollment at the two schools. To the contrary, from 1975 to 1977, the white enrollment at Gage Park fell from 1034 to 881 and that at Morgan Park fell from 1262 to 1071. (Compare Pl. Ex. 1 with A-40, ¶26).

At the same time, the quotas resulted in an effective denial of an integrated education to the excluded black children. When the plans were originally adopted, the Board provided that excluded black children could attend any one of a list of so-called "under-utilized" public high schools,

via public transportation. (A-39 to A-40, ¶24). The only under-utilized schools with significant white enrollments were located on the north side of Chicago, at least 11.4 miles from Gage Park and 18 miles from Morgan Park. (A-41, ¶28). As a result, virtually all the black children excluded from Morgan Park or Gage Park High Schools in 1975 and 1976 attended schools which were all or predominantly minority, and not a single child attended any under-utilized white school made available by the Board. (A-42 to A-44, ¶¶30-32). The Board's indifference as to excluded black children's ability to obtain an integrated education is underlined by its failure even to investigate whether excluded black children were attending integrated schools. (R.16, ¶1(d) at 2; R.25, Ex. 2).

The action below

Petitioners are black elementary and high school students who reside in the Morgan Park or Gage Park attendance areas. They brought the action below seeking an injunction against the quota plans and damages.

This case was presented to the trial judge for decision on an entirely documentary record. No Board member or representative testified as to the rationale for the quotas, and no demographer testified as to either past patterns or future projections of racial change. The sole evidence in support of the quotas were statistics showing past racial change in Gage Park and Morgan Park and in three other schools, Fenger, Orr, and Bowen. (e.g., A-21). But the Record equally contains evidence that nearby schools like Kenwood remained constant from 1970-76 at 26% white (Pl. Exs. 2, 50) and absolutely no explanation of why Gage Park and Morgan Park were more like Fenger than Ken-

wood.* There was also no evidence that the quotas would be effective in preventing the decline in white enrollments. In short, on the critical points of the need for the quotas, their rationality, and anticipated efficacy, there was little more in the Record than the *ipse dixit* of the Board.

Upon submission of all the evidence, the District Court announced that it was prepared to find the quota plans unconstitutional, but would reserve ruling pending any modification the Board might seek to propose. The Board thereafter modified the plans to provide free bus transportation for excluded black children to predominantly white or integrated schools principally on the north side of Chicago. This option involved a 1½ hour bus trip each way. (R.71, Beverly Review, September 14, 1977). In 1977, only 102 of the 1632 excluded children availed themselves of that option (A-47, ¶42). In 1978, after the exclusion of several hundred additional children, the Board reported that 359 students were participating in the busing program (A-14). Recent reports by the Board for the 1979 school year indicate that after another year of exclusion, the number of black children availing themselves of the busing option has dropped to 285.**

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* The Record also shows that some of the "under-utilized" schools made available to excluded black students *themselves* exhibited rapid change during this period (Lakeview went from 64.2% white to 43.6% white and Senn from 61.5% white to 44.0% white. Pl. Ex. 2, 50)—but contains no explanation of why a board purportedly intending to prevent racial change chose to bus excluded black students to schools already undergoing racial change. And nothing in the Record explains racial change in particular neighborhoods in the context of overall enrollment patterns in Chicago in which the white percentage dropped from 34.6% to 24.9% from 1970-76 (*Id.*).

** Chicago Board of Education, "Access to Excellence, Summary of Continuing Programs," Jan. 31, 1980, at 5.

The District Court held that although the original quota plans were unconstitutional, the post-trial modifications adopted by the Board cured any constitutional defects. (A-48, ¶¶1, 3). The District Court also found that these modifications to the quota plan "would not have been adopted but for the efforts of plaintiffs and their counsel" (A-48 to A-49, ¶6).*

The Court of Appeals affirmed in all respects. It began by noting that, as a racial classification, the quotas would be subject to the compelling state interest test, even though they were purportedly adopted for the benign purpose of preserving integration (A-19 n.); but that this test was satisfied because the preservation of integrated schools was *ipso facto* a compelling state interest (A-20 to A-21).

The Court of Appeals then rejected Petitioners' contention that the need for the quotas had not been established, by citing instances where rapid racial change had taken place (A-21), and ignoring schools like Kenwood, where an enrollment of 26% white had been maintained for years. (Pl. Exs. 2, 50). It also rejected the contention that the quotas were impermissible because they were a surrender to the racial prejudice of white students disinclined to attend schools attended by large numbers of blacks ("white

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* Nevertheless, the District Court, while awarding costs to plaintiffs, denied their request for attorneys fees under 20 U.S.C. §1617 and 42 U.S.C. §1988 (A-51), principally on the erroneous ground —not even defended by the Board on appeal—that plaintiff's counsel was not entitled to fees because it accepted the case on a *pro bono publico* basis through the Lawyers Committee for Civil Rights Under Law (Tr., Jan. 13, 1978). The District Court also expressed "doubts" if plaintiffs "prevailed" within the meaning of the attorneys' fee statute, since they continued to urge that the revised plans were unconstitutional (Tr. Jan. 13, 1978).

flight"). The Court of Appeals recognized that the quotas were in fact necessitated by white flight (A-22 to A-23), and that white flight could not be used as an excuse to avoid eradicating past discrimination (A-21 to A-22). It held, however, that preventing white flight was a permissible basis for a "voluntary affirmative action" program, even if it disadvantaged black children. (A-23).

In the final portion of its opinion, the Court of Appeals conceded that the quotas could not be upheld if there was an alternative less burdensome on blacks. (A-26). Petitioners, in fact, had suggested a number of such alternatives, including a broader desegregation plan, efforts to integrate the predominantly white schools near Morgan Park and Gage Park, and a plan involving the pairing of Gage Park and Curie, an *under-utilized* school less than 2 miles away which was 76% white. (R. 71, Letter of July 22, 1977). The *sole reason* the Board rejected the pairing proposal was that Curie was located in Marquette Park (an area that had witnessed racial disturbances by whites protesting against an influx of minorities), so that a pairing program allegedly "would be educationally disruptive." (Transcript, August 5, 1977, at 7-10). The Court of Appeals did not give strict scrutiny to the Board's rejection of these and other conceivable less discriminatory alternatives, but instead explicitly deferred to the Board's judgment (A-27):

> "The appellants have advanced alternative proposals which they claim would preserve integrated student bodies at Gage Park and Morgan Park High Schools in a less discriminatory fashion. We are not persuaded, however, that these alternatives offer a viable means of preventing *de facto* segregation at these two high schools. Moreover, we regard the mechanics of integration, particularly in the circumstances of voluntary remedial action, where the pur-

> pose is obviously to implement the promise of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and effectively achieves that objective, to be ordinarily a matter within the discretion of local school authorities."

In short, the effect of the Court of Appeals decision is to defer to a school board's imposition of unique hardships on blacks, even when greater than necessary to achieve its goals, whenever the school board professes an integrative purpose.

REASONS FOR GRANTING THE WRIT

1. The Issues in this Case Are of Extreme Importance

The quotas in this case were purportedly adopted to arrest a pattern of neighborhood racial change prevalent in many cities, especially those in the north. The pattern is simple—blacks move into a neighborhood and attend the public schools, and white enrollments drop as the "white flight" phenomenon takes place. (A-21 to A-23). As neighborhood after neighborhood undergoes such change, overall enrollments in a city's public schools become increasingly minority.

The "solution" adopted by the Chicago Board was to place a ceiling on black enrollments in an effort to stem white flight. The surface simplicity of this approach will make it an attractive prospect for all cities with changing neighborhoods. The Court of Appeals decision will therefore have broad ramifications throughout the nation.

The problem, however, is that the Court of Appeals decision explicitly defers to the "discretion of local school authorities" (A-27) in placing the burdens of integration exclusively on blacks, so long as the school board invokes an integrative purpose. This deference is apparent at two crucial stages of the Court of Appeals' analysis. First, after an elaborate insistence that racial quotas purportedly designed to preserve integration must still be justified by a compelling state interest (A-19 n.), the Court of Appeals holds that preservation of integration is *ipso facto* sufficiently compelling. (A-20 to A-21). This reasoning is not only circular, but it effectively precludes a searching judicial inquiry into either the *bona fides* of a racial classification or its detrimental effects. The second example of

deference is even more explicit, and involves the Court of Appeals' failure to scrutinize the Board's refusal to adopt less discriminatory alternatives. (A-27).

The dire effects of such deference by a reviewing Court are apparent in this case. For example, it is at least equally plausible—particularly given the Board's adherence to overall segregation patterns in Chicago—that the prevention of racial change in Morgan Park and Gage Park was designed to preserve those communities as buffer zones between the black inner city and the predominantly white enclaves farther to the west. Indeed, this conclusion is buttressed by the Board's refusal to pair Gage Park and Curie for the sole reason that the white residents of Marquette Park would resent "a large influx of minority students." (Transcript, Aug. 5, 1977 at 7-10). Moreover, the effects of the program scarcely support a conclusion that a benign purpose is being achieved. While quota levels are being attained through the exclusion of increasing numbers of blacks annually, the flight of whites has not been stemmed. Black children alone are stigmatized as unwanted in their neighborhood school, when no other child in Chicago is so treated.* And the vast majority of excluded blacks do not obtain an integrated education, even after the Board's post-trial adoption of an optional busing program. Thus, on balance, it is scarcely apparent that the quota plans are more helpful than harmful. The problem with the Court of Appeals decision, however, is that it does not even purport to strike that balance, but merely defers to the *ipse dixit* of the Board.

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* As this Court noted in *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954) with respect to children in grade and high schools:

> "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

As the facts of this case demonstrate, an uncritical acceptance of a stated purpose to prevent segregation as a compelling state interest (A-20 to A-21), and an explicit deference to the discretion of local school authorities (A-27), will not fully protect the constitutional rights of blacks. As four Justices of this Court have noted, "any statute must be stricken that stigmatizes any group or singles out those least well represented in a political process to bear the brunt of a benign program." *University of California Regents* v. *Bakke,* 438 U.S. 265, 361 (1978) (Brennan, White, Marshall & Blackmun, JJ.). Thus, in the absence of a rule of law requiring strict scrutiny and a compelling state interest for *all* aspects of an explicit racial classification—the reason for the program, the basis if any for restricting the scope of the problem to be solved,* the effects of the program, and the specific reasons for not selecting less discriminatory alternatives—there can be no assurance that a political majority is not discriminating against a minority under the banner of a benign motive. And this is particularly true where, as here, the purported benign motive of preventing segregation has its origins in the racial prejudice underlying the white flight phenomenon. See *United States* v. *Scotland Neck Board of Education,* 407 U.S. 484, 487, 490-91 (1972) (fears of white flight do not justify racial discrimination even though the school system would be 57% white and thus "integrated").

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* For example, it is well-established that where there are general evils to be corrected, the choice of piecemeal solutions may not be made on racial grounds. *McLaughlin* v. *Florida,* 379 U.S. 184, 193-94 (1964). Thus, under a properly-applied strict scrutiny test, the Board should have explained why its efforts to foster integration extended only to limiting black attendance at integrated schools, and did not include mandatory measures to integrate schools which were predominantly white. The Court of Appeals required no such explanation.

Significantly, the Court of Appeals' deference to local school authorities is most explicit at the very point that strict scrutiny is most critical—in the choice of less discriminatory alternatives. By such deference, the Court of Appeals is eliminating the core of the equal protection guarantee—the assurance that blacks will not suffer deprivations which the state will not inflict on whites. The acid test is not whether a state's motive for a racial classification is laudable, but whether the state is willing to achieve its allegedly benign purposes by imposing the same burdens on whites as it imposes on blacks. All the evidence in this case suggests that the Chicago Board will not adopt any mandatory measures involving white children in the name of integration. By contrast, the Board adopted the quotas disadvantaging blacks over the protests of the black community, and without any concern—until forced to modify its plan by this litigation—for excluded black children's opportunity to attend integrated schools. This disparate treatment of whites and blacks is the antithesis of equal protection, but it is entirely overlooked in the Court of Appeals' broad deference to local authorities.

In short, the Court of Appeals' approach to this case sanctions explicit racial quotas disadvantaging blacks whenever the government invokes the talisman of integrative purpose. Such an approach falls far short of the "most rigid scrutiny," *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944), which is necessary to vindicate the purpose of the equal protection clause to protect politically disadvantaged groups. *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938). It would be a bitter irony if the goal of integration, which this Court extended to minorities in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), as a promise of equality, became a justification for further discrimination.

2. The Decision Below Conflicts in Principle with the Decisions of this Court and Other Circuits

The Court of Appeals decision, moreover, conflicts with the holding and individual opinions of this Court in *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978). The conflict in result is clear. If an explicit quota cannot be used to discriminate against whites for the benefit of blacks, it surely cannot be used to discriminate against blacks, the traditional victims of discrimination, particularly where the principal beneficiaries of the quota are the whites who otherwise would be disinclined to attend the public schools.*

The opinions of the individual Justices in *Bakke* equally refute the Court of Appeals' decision. The *very purpose* of the Chicago quotas "is to assure within [a] student body some specified percentage of a particular group mere-

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* The Court of Appeals purported to distinguish *Bakke* by drawing a distinction between a total deprivation of a medical education as opposed to an assignment to a different school. (A-25). This distinction ignores the palpable deprivations suffered by quota victims. There is no question, for example, that every black child in the affected Chicago neighborhoods faces uncertainty as to the school he will attend, while every white child is assured of his admittance. (A-37 to A-39, ¶¶15-20). It is equally clear that even under the court-sanctioned busing plan, black children must travel 1½ hours *each way* to obtain an integrated education (R. 71, Beverly Review, September 14, 1977) and that faced with these burdens, the vast majority of excluded children choose to attend a closer, nonintegrated school. (A-42 to A-44, ¶¶30-32). Thus, the distinction adopted by the Court of Appeals would approve the quota in *Bakke* if Mr. Bakke found a place in another, perhaps inferior, medical school, and would approve affirmative action job quotas if the worker were demoted rather than fired. The Court of Appeals' "total denial" test is thus not only a semantic quicksand—petitioners, after all, were "totally denied" a right to attend their neighborhood school—but also creates a shifting standard that can only breed confusion and uncertainty in the development and application of racial quotas generally.

ly because of its race," and is thus "discrimination for its own sake" and "facially invalid." 438 U.S. at 307 (Powell, J.). And the quotas, unlike others approved by this Court, were not adopted in response to any "judicial, legislative, or administrative finding of constitutional or statutory violations." *Id.* The quotas here, moreover, suffer from all the infirmities which the *Bakke* quotas were said not to have—the quotas here harm a class with the "traditional indicia of suspectness," *id.* at 357 (Brennan, White, Marshall and Blackmun, JJ.); they are not designed either to "remove the disparate racial impact" of past government actions or to cure "the product of past discrimination," *id.* at 369; they "operate to stigmatize or single out [a] discrete and insular" minority group, *id.* at 374; they relegate excluded children to other schools which, in a neighborhood school system, creates "a significant likelihood that they will be treated as second-class citizens because of their color," *id.* at 375; and they "establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted." *Id.* And finally, §601 of the 1964 Civil Rights Act, 42 U.S.C. §2000d, is not only itself applicable to the quotas here, but similar reasoning applies to invalidate the quotas under 42 U.S.C. §§1981, 1983 and 20 U.S.C. §1703(c). See 438 U.S. at 412-18 (Stevens, J.). Thus, the Court of Appeals decision conflicts with *Bakke* and the reasoning of the Justices reflected therein.

It also conflicts with a long line of cases in other circuits which hold it impermissible to impose a disproportionate burden of integration on blacks. *E.g., Arvizu* v. *Waco Independent School District,* 495 F.2d 499, 504-07 (5th Cir. 1974) (and cases there cited) ("[I]t is incumbent upon district courts to insure that the burdens of desegregation are distributed equitably"); *Clark* v. *Board of Education,* 449 F.2d 493, 499 (8th Cir. 1971), *cert. denied,* 405 U.S. 936 (1972) ("the burden on all students, black and white, should be as equitable as possible"); *Lee* v. *Macon County Board of Education,* 448 F.2d 746, 753-54

(5th Cir. 1971); *Moss* v. *Stamford Board of Education,* 350 F.Supp. 879 (D. Conn. 1972); *Brice* v. *Landis,* 314 F.Supp. 974, 976-78 (N.D. Cal. 1969). *See also Haney* v. *County Board of Education,* 429 F.2d 364, 371-72 (8th Cir. 1970). And fear of "white flight" is not a sufficient explanation for imposition of an excessive burden on blacks. *E.g., Lee, supra,* 448 F.2d at 754.

In concluding that it was appropriate to place the *entire* burden of integration on blacks, the Court of Appeals' opinion conflicts with these cases holding even a disproportionate burden on blacks to be impermissible. It also conflicts, specifically, with the holding in *NAACP* v. *Lansing Board of Education,* 559 F.2d 1042, 1052 (6th Cir.) *cert. denied,* 434 U.S. 997 (1977), *aff'g,* 429 F. Supp. 583, 620-21 (W.D. Mich. 1976) that a "one-way bussing" program which transported blacks but allowed whites to remain in their neighborhood school, "without a corresponding effort to spread the burdens of integration more equitably through the system, is an act of *de jure* segregation." And the quotas here, unlike the plans addressed in several cases cited by the Court of Appeals (A-22 to A-23), do not even have the virtue of being part of an effort to eradicate segregation on a system-wide basis.*

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* The same point disposes of the Court of Appeals' reliance on this Court's dictum in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971), that a school board may adopt a voluntary plan to promote integration. In *Swann,* however, this Court carefully noted that such a program would be permissible where "each school'" in the district would reflect the district-wide racial make-up. Here, the quotas are not part of an effort to desegregate an entire system, and the racial balance they are seeking to preserve at two schools is virtually twice the 25% white enrollment of the system as a whole. (Pl. Ex. 2). To preserve some schools as 50% white in such a setting necessarily means that the remaining schools will have disproportionately black enrollments. And the failure to eradicate segregation on a system-wide basis raises the danger, amply present here, that a school board's selective efforts are an attempt to disadvantage blacks under the guise of benign objectives.

Thus, while purporting to adhere to the strict scrutiny standards applicable to explicit racial classifications, the Court of Appeals in fact accepted the mere recitation of a benign purpose as an automatic shield for a quota disadvantaging blacks. It appeared to place the burden of proving the absence of less discriminatory alternatives on plaintiffs rather than on the Board by explicitly deferring to the "discretion of local school officials." (A-27). In peremptory fashion, it dismissed the viability of other alternatives, including the suggestion for a pairing of Gage Park and Curie which the Board had rejected for the sole reason that it would discomfit the white residents of Marquette Park. (Transcript, August 5, 1977, at 7-10). In short, the Court of Appeals decision is inconsistent with the standards articulated by this Court and other Circuits to test racial classifications, particularly those adversely affecting blacks.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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March, 1980

Appendices

APPENDICES

APPENDIX A

Opinion of the Court of Appeals

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1215

KATHY SUE JOHNSON, etc., *et al.*, and DARCEL MILTON, etc., *et al.*,

Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 76-C-995, 76-C-996—HUBERT L. WILL, *Judge.*

Argued October 30, 1978—Decided August 13, 1979

Before CASTLE, *Senior Circuit Judge,* BAUER and WOOD, *Circuit Judges.*

BAUER, *Circuit Judge.* The principal issue presented by this appeal is whether the Constitution permits local school authorities to impose racial quotas on enrollments

in connection with a desegregation plan voluntarily enacted to prevent *de facto* segregation in the public schools. Plaintiffs-appellants appeal from the order of the district court upholding the challenged desegregation plan as constitutional and enjoining the defendants-appellees to maintain and to continue the plan, as modified to provide for the voluntary busing of students excluded from admission to their neighborhood high schools to alternative integrated high schools. Appellants further appeal from the order of the district court denying their petition for attorneys fees. We affirm the judgments appealed from for the reasons set forth below.

I

These consolidated civil rights actions for declaratory judgment and injunctive relief were filed on March 15, 1976, challenging as unconstitutional a desegregation plan adopted voluntarily by the Board of Education of the City of Chicago in an effort to arrest the trend toward segregated enrollments at two Chicago public secondary schools. The challenged desegregation plan, commonly referred to as the "Student Racial Stabilization Quota Plan" ("Plan"), established a ceiling on enrollments and imposed racial quotas with respect to admissions at Morgan Park and Gage Park High Schools. Plaintiffs-appellants in *Johnson* v. *Board of Education* are black children and their parents residing in the Morgan Park High School attendance area.[1]

[1] The term "attendance area", as used herein, refers to the geographic zone or sub-district of the Chicago public school district established by the Board of Education for Gage Park and Morgan Park High Schools. All elementary students residing within the Gage Park sub-district are eligible to attend Gage Park High School. Similarly, all elementary students residing in the Morgan Park sub-district are eligible to attend Morgan Park High School.

Plaintiffs-appellants in *Milton* v. *Board of Education* are black children and their parents residing in the Gage Park High School attendance area. Plaintiffs' complaints alleged that the Plans, as instituted at Morgan Park and Gage Park High Schools, deprived them of their rights under the Constitution and under Title 42 U.S.C. §§ 1981 and 1983, and under Title 20 U.S.C. § 1703(c) because the Plans restricted the admission of minority students to these high schools solely on the basis of race.

Defendants-appellees named in these actions are the Board of Education of the City of Chicago, the individual members of the Board of Education, and Dr. Joseph P. Hannon, General Superintendent of Schools. Defendants filed answers to the complaints, denying the Plans were unconstitutional and denying plaintiffs were deprived of any rights under federal law. Defendants further alleged that plaintiffs had no constitutional right to attend Morgan Park or Gage Park High School since the Board of Education, vested by state statute with the supervision and management of the public school system of the City of Chicago, is empowered to divide the city into attendance areas and to apportion the pupils to the several schools, taking into consideration the prevention of racial segregation in the public schools. In the performance of these statutory duties, the Board contended the Plans were necessary to alleviate overcrowding and to promote integration at Morgan Park and Gage Park High Schools, both of which had experienced an accelerated change in the size and racial composition of their enrollments as a result of a concomitant demographic change in the residential neighborhoods encompassing the attendance areas of these schools.

On April 29, 1976, three days after the filing of defendants' answer, plaintiffs in *Johnson* presented a motion for a temporary restraining order seeking to enjoin the

implementation of the Plan at Morgan Park High School, which was scheduled to begin the next day with a lottery drawing to select the incoming freshman class for the fall of 1976. The district court denied the motion. On August 17, 1976, after extensive discovery by means of interrogatories and document production, plaintiffs filed a motion for a preliminary injunction or in the alternative for summary judgment. On September 27, 1976, the district court denied the alternative motion for summary judgment, but deferred ruling on plaintiffs' motion for preliminary injunction, stating its preference for a modification of the Plans to include a voluntary busing program for students excluded from these two schools to attend alternative integrated high schools.

At the conclusion of discovery, entry of a final pre-trial order, stipulation of additional facts and admission of exhibits into evidence, and after both parties agreed to withdraw objections, the parties rested on June 27, 1977. At that time, counsel for the Board advised the court of a pending modification of the Plans to be acted upon at the next Board meeting. The district court then stated it was prepared to find the Plans as originally adopted to be unconstitutional, but would reserve final ruling pending any modification the Board might wish to present.

On July 13, 1977, the Board adopted a modification of the Plans, which provided bus transportation to white or integrated schools from a convenient point near the residences of all students in the Gage Park and Morgan Park attendance areas who were not selected for admission to these two schools under the Plans. By an order of the district court entered August 12, 1977, the Board was directed to implement procedures for publicity and student counseling with respect to the Plans, as modified, and further, to provide that designated spaces at the alternative schools

which were not filled by students excluded from one school (e.g., Gage Park) would be made available to students excluded from the other school (e.g., Morgan Park).

On December 30, 1977, the district court entered its findings of fact and conclusions of law, and granted judgment in favor of the defendants. The court held that the Plans, as modified to include bus transportation to primarily white or integrated schools for those students not admitted to Gage Park or Morgan Park High Schools, restored to plaintiffs their constitutional rights in that plaintiffs had a meaningful opportunity to attend a Chicago public high school in an integrated setting. The court further ordered that defendants be enjoined to continue the Plans, as modified. On January 23, 1978, the district court granted plaintiffs' petition for costs, but denied their request for attorneys fees.

Plaintiffs subsequently appealed from these adverse judgments to this Court. First, appellants contend the Plans, as modified, violate their rights secured by the equal protection clause of the Fourteenth Amendment. Second, appellants contend that the district court erred in denying their request for attorneys fees.

II

Before addressing the merits of the appellants' contentions, however, it is necessary to explicate in appropriate detail the development and implementation of the challenged desegregation plan, as supported by the record before this Court.

Gage Park and Morgan Park High Schools Prior to the Adoption of the Plans

Gage Park High School, 5630 South Rockwell Avenue (2600 West), Chicago, and Morgan Park High School, 1744 West Pryor Avenue (11200 South), are public high

schools owned and operated by the Board of Education of the City of Chicago. But for the Board's Plans, freezing enrollment and establishing racial quotas with respect to admissions at these two high schools, all eighth grade students residing in the Gage Park or Morgan Park attendance areas would have been offered the opportunity to attend Gage Park or Morgan Park High School. In 1975, Gage Park High School was approximately 41% white and 59% nonwhite, while Morgan Park was 37% white and 63% nonwhite. The comparable figures for 1976 are 42% white and 58% nonwhite for Gage Park, and 38% white and 62% nonwhite for Morgan Park. As the district court found, students enrolled at Gage Park and Morgan Park are thus attending school in an integrated setting.

The district court also found that the residential neighborhoods encompassing attendance areas for these two schools were in part undergoing an accelerated racial change from white to black in the period immediately preceding the implementation of the Plans, which began in September 1975 at Gage Park High School and in September 1976 at Morgan Park High School. Both schools were also operating in excess of their permanent facility capacities because of increasing enrollments.

During the period from 1972 to 1974, black enrollment at Gage Park had increased from 1,056 to 1,361. The racial composition of all students attending public and nonpublic elementary schools in the Gage Park attendance area in 1975 was 5,235 black, 8,617 white, 1,174 Hispanic and 110 "other". As of January 30, 1976, enrollment at Gage Park High School was 2,441 and the school was operating at 106% of capacity.

During the period from 1972 to 1975, black student enrollment at Morgan Park had increased from 52.3% to 62.3% and white student enrollment had declined from

45.7% to 36.9%. In this same period, total enrollment increased from 3,092 to 3,423. The racial composition of all students attending public and nonpublic elementary schools and residing in the Morgan Park attendance area in 1976 was 6,842 black, 7,312 white, and 144 "other". As of January 30, 1976, enrollment at Morgan Park High School was 3,323 and the school was operating at 128.6% of capacity of permanent facilities.

Statistics presented by the Board of Education indicated that in rapidly changing neighborhoods where no action had been undertaken by the Board segregated schools had resulted. For example, during the period from 1970-1975, white enrollment at the following Chicago public high schools declined dramatically: Fenger High School, 46.6% to 1.0%; Orr High School, 30.6% to 5.0%; Bowen High School, 36.2% to 6.6%. The Board therefore regarded the Student Racial Stabilization Plans as necessary to prevent the incidences of racial isolation which had occurred at schools situated in neighborhoods experiencing a rapid change in racial composition.

The Board's stated purpose for the adoption of the racial quotas was to prevent overcrowding and to prevent Gage Park and Morgan Park High Schools from becoming racially segregated. Consequently, the quota for the admission of black students at each school was necessarily set at a lower level than that at which black students would have applied and have been admitted but for the quota.

The Gage Park Plan

On May 14, 1975, the Board of Education of the City of Chicago adopted a Student Racial Stabilization Quota Plan establishing a ceiling on enrollment and a racial quota with respect to admissions at Gage Park High School. Under this Plan, enrollment, which had reached 2,441 and was

projected at 3,100 for September 1975, would be held to a maximum of 2,800 students with a racial composition of 48% black, 42% white, 8% Hispanic and 2% principal's option. The selection of incoming freshmen would be determined by lottery.

The first lottery, in preparation for the September 1975 academic year at Gage Park High School, was held on June 2, 1975. Under the Plan, separate lottery lists were prepared for white, black and Hispanic students and students were selected for admission in the order their names appeared on the list until the quota for their race had been filled. Thus, the group of students accepted into Gage Park for the September 1975 school year included all those names down to a red line on the lottery list for each race. The red line appeared immediately below the last name on the lottery list for white students—No. 289. By contrast, the red line appeared below name 200 on the black list, which had a total of 498 names, indicating the exclusion as of that date of 298 applicants.

Students initially denied admission were offered the opportunity to attend Gage Park High School in the event another student of the same race, previously admitted to the school, elected not to attend. Moreover, since the racial percentages were to be applicable to the school as a whole rather than to the incoming class, additional black students were to be admitted to the extent that additional white students elected to attend Gage Park so that the prescribed racial balance was maintained. Thus, within two weeks after the lottery drawing an additional 60 black elementary students who had been placed on a "waiting list" were given the option to enroll in Gage Park High School. By October 1, 1975, all of the originally excluded 498 black students had been offered the option of enrolling in Gage Park. An additional 212 black students who applied for

admission after the June 2, 1975 lottery were not offered the option of enrolling into Gage Park High School. Each of the 136 additional white students applying for admission after the June 2, 1975 lottery were offered the opportunity to enroll at Gage Park High School.

The Gage Park Plan was also applied to the freshman class entering in September 1976, with the applicable lottery drawing held on January 19, 1976. The entering class in 1976, as determined by the drawing, was 44% white (229/519), 43% black (224/519) and 12% Hispanic (61/519). A student racial/ethnic survey dated October 29, 1976, and conducted by the Board of Education, showed that the entering freshman class of September 1976 at Gage Park was in fact 42.6% white (228/535), 45.4% black (243/535), and 11.4% Hispanic (61/535).[2]

With respect to the January 1976 drawing for the school year commencing in September 1976, a red line appeared immediately below the last name on the list for white students, No. 309. By contrast, the red line appeared below name No. 300 on the black list, which contained a total of 626 names, indicating the exclusion at the time of the drawing of 326 black applicants. Thus, all 309 white students included in the January lottery and all 181 white students applying thereafter were offered the opportunity to enroll in Gage Park for September 1976. Of the 626 black students included in the lottery and the 210 additional students applying thereafter, 300 black students were permitted to enroll and 243 actually attended Gage Park High School. At least 411 black students were excluded from Gage Park High School as of October 12, 1976 as a result of the racial quota.

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[2] In 1975 and 1976, all of the freshmen attended the Gage Park High School "branch", which is on the same campus as the high school, is part of the permanent facility, and is utilized by freshmen only.

On January 21, 1977, a lottery drawing was held for the September 1977 freshman class at Gage Park High School. Of the 754 black children in the lottery drawing, 425 were accepted as enrollees and 329 were denied admission. Of the 85 Hispanic students, 35 were accepted and 50 were denied admission. Not one of the 364 white students who applied was denied admission to Gage Park High School.

The Morgan Park Plan

On March 10, 1976, the Board of Education adopted a Student Racial Stabilization Quota Plan which established a ceiling on enrollment and imposed a racial quota with respect to admissions at Morgan Park High School. Overcrowding at Morgan Park, which was operating at 128.6% of its permanent facilities capacity, was to be reduced by limiting the enrollment of incoming 9th graders to 700 students divided approximately 50% white and 50% black. Unlike Gage Park, there is no significant number of Hispanic students attending Morgan Park High School. The Morgan Park Plan differed in two other respects from that implemented at Gage Park. First, the racial quotas were applied to each entering class, rather than to the school as a whole. Second, the Morgan Park Plan provided for the admission of a maximum of 350 black students, even if less than 350 white students applied. By contrast, the Gage Park Plan admitted black students to the extent that sufficient numbers of white students were in attendance so that the requisite 48% to 42% black-to-white student ratio was maintained.

The lottery to determine the September 1976 admissions to Morgan Park High School was held on April 30, 1976. As of May 10, 1976, ten days after the drawing, all 484 white students in the lottery were offered the option to

enroll in Morgan Park. An additional white student, who apparently was never assigned a lottery number, was notified of her admission on May 11, 1976. Subsequently, 33 white students applying as transfer students were also admitted. Of the 480 black students seeking admission, 350 were offered the option to enroll in Morgan Park, indicating that 131 black students were denied admission as of that date. On or after September 27, 1976, 33 of the black students placed on the "waiting list" were offered the opportunity to enroll at Morgan Park. A number of such students, who were attending other schools at that time, declined to transfer to Morgan Park. Thus, as of October 29, 1976, 538 black and 490 nonblack students were eligible to apply for admission to the 1976 freshman class. No white student was denied admission to Morgan Park, but 126 black students were denied admission, which number included 15 transfer students. The number of students actually admitted to Morgan Park High School as freshmen in September 1976 was 350 black and 272 nonblack.

On February 3, 1977, the applicable lottery drawing was held for the September 1977 freshman class at Morgan Park High School. The eligible students included 610 whites and 612 blacks. In April 1977, each white student who wished to attend Morgan Park High School was notified of his or her admission; the total admitted was 317. At the same time, 350 black students were notified of their admission, and 157 black children who wished to attend the school were excluded.

Results of the Original Plans

At the time the Student Racial Stabilization Quota Plans were adopted there were substantially more white students than black students in public and nonpublic elementary schools in the Morgan Park and Gage Park attendance

areas. However, it became apparent after the Plans were in operation that the number of white students seeking admission at each high school was less than the quota set for white students and that the number of black and Hispanic students applying exceeded the quotas for those groups. Thus, no white student was ever denied admission as a result of the quotas instituted at Gage Park and Morgan Park High Schools, but hundreds of black and Hispanic students were denied admission to these schools annually from the inception of the Plans.

Under the Plans as originally adopted by the Board, students denied admission to Gage Park and Morgan Park High Schools were permitted to attend any "under-utilized" Chicago public high school through the Board's Permissive Transfer Program.[3] Under this Program, every child attending an over-utilized high school in the City of Chicago (which included Gage Park and Morgan Park High Schools) was given the option of attending an under-utilized school. Thus, prior to and irrespective of the Student Racial Stabilization Quota Plans, Gage Park and Morgan Park High School students could have elected to attend these under-utilized schools.

Until the Board adopted a revised voluntary transfer program, excluded students residing in the Morgan Park and Gage Park attendance areas were required to travel to alternative schools using public transportation. Carfare was provided to students excluded from Gage Park High School commencing in September or October 1976, the

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[3] "Under-utilized" was defined to mean a school with a total student enrollment below the "city-wide per cent of capacity" of 101.3%. In 1975, 22 of 51 general high schools were above the level of 101.3% utilization (excluding so-called "temporary facilities"). In 1976, 29 of 51 high schools were above that level.

second year the Plan was in operation. For students excluded from Morgan Park High School carfare was provided from the inception of the Plan in September 1976.

Of the eighteen general high schools available to those denied admission as a result of the racial quotas, six have significant white enrollments and are located on the north side of the City of Chicago. None of these six predominantly white-attended schools are situated south of 4000 North and three are north of 5800 North in Chicago. By contrast, Gage Park High School is located at 5600 South and Morgan Park is located at 11200 South in Chicago. Thus, the closest of these primarily white alternative schools, Lakeview, is 11.4 miles from Gage Park and 18.15 miles from Morgan Park High School.

Accordingly, under the original Plans, travel to these eighteen schools from Gage Park or Morgan Park High Schools involved (1) taking a bus to the Dan Ryan rapid transit line; (2) transferring from the Dan Ryan to the Howard or Ravenswood rapid transit lines; (3) travel on the Howard or Ravenswood rapid transit lines; and in two instances (4) an additional bus trip to the school.

Of the 416 black students excluded from Gage Park High School as a result of the 1975 lottery, 306 of these students enrolled in 28 other predominantly black high schools, 11 attended 6 other schools with significant white enrollments, and data with respect to the 99 additional black students was unavailable. Of the 539 black students denied admission to Gage Park in the 1976 lottery, 471 students attended 24 alternative high schools with predominantly black enrollments, and 68 students enrolled in 6 alternative high schools with significant white enrollments.

Of the 193 black students excluded from admission to Morgan Park High School in the 1976 lottery, 191 at-

tended alternative schools whose enrollments were over 99% minority, and two students attended one school which had a significant white student enrollment.

Modification of the Plans

On July 13, 1977, the Board of Education adopted Board Report No. 77-212-6 (Revised), which modified the Gage Park and Morgan Park Student Racial Stabilization Quota Plans by providing excluded minority students the option of attending certain North side predominantly white or integrated schools by means of bus transportation provided by the Board of Education. Under the terms of the modification enacted by the Board, ten alternative white or integrated schools were made available to excluded Gage Park and Morgan Park black children, with up to 1,262 spaces designated for Gage Park transfer students and up to 390 spaces designated for Morgan Park transfer students to these schools. In addition, the modification included a publicity program concerning the Plans and a counseling service for students who participated in the Plans. These modifications were implemented immediately by the Board in order to be incorporated into the operation of the Plans for the school term beginning in September 1977.

Results of the Modified Plans

As of October 12, 1977, 102 of the 1,632 students excluded as a result of the Gage Park and Morgan Park Plans had availed themselves of the opportunity to attend one of these ten alternative high schools, utilizing 7 buses at a cost of $1,014 per day. As of October 1978, the Board reported that 359 excluded students were participating in the Plan for the 1978 school year, and attending nine of the alternative schools offered under the modified Plan.

The district court found that the Plans were attempts on the part of the Board to relieve overcrowding and to promote integration at schools situated in rapidly changing neighborhoods, and that experience had shown that the Board achieved both objectives at each high school. Thus, as a result of the modified Plans, the racial balance at Gage Park High School is 45.4% black, 41.9% white, and 12.7% "other", and the racial balance at Morgan Park is 59% black and 41% white. The enrollment at Gage Park has been reduced to 2,102 students and the school is operating at 91.3% of capacity. The Morgan Park enrollment has been reduced to 2,613 students and the school is operating at 101.2% of capacity.

III

Appellants' principal contention on appeal is that the Student Racial Stabilization Quota Plans instituted by the Board of Education at Gage Park and Morgan Park High Schools are statutorily and constitutionally infirm. We are not persuaded by the arguments advanced in support of these contentions, and accordingly conclude that the Plans, as modified, are statutorily and constitutionally permissible.

A

We begin by addressing the appellants' argument that the Illinois School Code explicitly proscribes the racial quotas challenged in this litigation.[4] It is true, as the

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[4] The Illinois statute governing the powers of the Board of Education of the City of Chicago provides, in pertinent part, as follows:

"The board shall exercise general supervision and management of the public education and the public school system of the city, and shall have power:

* * * * *

"7. To divide the city into sub-districts and apportion the pupils to the several schools, but no pupil shall be excluded

(footnote continued)

appellants argue, that the statute appears on its face to prohibit the Board from considering race as a basis for excluding a student from admission to a public school situated within a particular attendance area. However, it is also true that the statute empowers the Board to consider race as a basis for revising the geographic boundaries of a particular attendance area where necessary to prevent racially segregated enrollments. Indeed, we think a fair reading of the statute discloses that the central purpose of this provision was to invest the Board with sufficient discretionary authority to achieve "the prevention of segregation and the elimination of separation of children in public schools because of color, race, sex or nationality." Viewing the statute in light of this purpose, we perceive no rational basis for a statutory construction which permits the Board to prevent segregation through a racially-based redistricting plan but prohibits the Board from achieving the same end through a racially-based intradistrict transfer plan. We therefore decline to ascribe to the statute a prohibition inconsistent with its underlying purpose, and accordingly hold that the statute does not foreclose the Board from restricting the racial composition of the enrollment at a school within a particular attendance area where, as here, such a remedial measure achieves the prevention of *de facto* segregation in the public schools. *See North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 45-46 (1971).

(footnote continued)

> from or segregated in any such school on account of his color, race, sex, or nationality. The board shall, as soon as practicable, and from time to time thereafter, change or revise existing sub-districts or create new sub-districts in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race, sex or nationality. . . ."

Ill. Rev. Stat. 1975, ch. 122, § 34-18, para. 7.

Nor are we persuaded that the Board of Education exceeded its statutory authority in establishing racial quotas with respect to admissions at Gage Park and Morgan Park High Schools. In reviewing various integration solutions promulgated by local school boards, the Supreme Court has consistently recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley,* 418 U.S. 717, 741-742 (1974); *San Antonio Independent School District* v. *Rodriquez,* 411 U.S. 1, 49 (1973); *Wright* v. *Council of City of Emporia,* 407 U.S. 451, 469 (1972).

Moreover, it is well-settled in both federal and state law that local school boards may voluntarily adopt plans including busing to promote integration. As the Supreme Court declared in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971):

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluarlistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this is within the broad discretionary powers of school authorities. . . ."

402 U.S. at 16. The Illinois Supreme Court has also recognized the authority of local school boards to undertake voluntary programs designed to remedy *de facto* segregation, as stated in *Tometz* v. *Board of Education, Waukegan City School District No. 61,* 39 Ill.2d 593, 237 N.E.2d 498 (1968):

> "State laws or administrative policies, directed toward the reduction and eventual elimination of *de facto* segregation of children in the schools and racial imbalance, have been approved by every high State court which has considered the issue . . . . Similarly,

> the Federal courts which have considered the issue . . . have recognized that *voluntary* programs of local school authorities designed to alleviate *de facto* segregation and racial imbalance in the schools are not constitutionally forbidden . . . ."

39 Ill.2d 597, 237 N.E.2d at 501 (citations omitted) (emphasis added).

In the case at bar, the Chicago Board of Education voluntarily adopted a desegration plan designed to prevent *de facto* racial segregation at two public high schools. The record is uncontroverted that prior to the implementation of the Plans, the attendance areas for Gage Park and Morgan Park High Schools were rapidly changing in residential occupancy from white to black and the trend in enrollments was toward segregated student bodies. The district court found, based on a voluminous record, that the Plans successfully arrested this trend and concluded that, as a result of the Board's modification of the Plans, all high school students living in those attendance areas were provided with a meaningful and viable opportunity to attend an integrated high school.

Accordingly, in view of the broad statutory powers vested in the Board to formulate and to implement educational policy, including the establishment of programs designed to preserve integration in the public schools, we regard the Board's efforts to prevent *de facto* segregation as a legitimate exercise of its discretionary authority consistent with its legislative mandate and established principles of local school autonomy.

B

Of course, no state law may operate in contravention of the Constitution. School board policies and the present laws with respect to local autonomy are not sacrosanct, and if they conflict with the Fourteenth Amendment fed-

eral courts are charged with an affirmative duty to prescribe appropriate remedies. *Milliken* v. *Bradley,* 418 U.S. 717, 744 (1973). The principal task before this Court, therefore, is to determine whether the imposition of a racial quota against the admission of minority students to particular schools, however "benign" in its objectives, violates the equal protection clause of the Fourteenth Amendment.[5]

It is well-settled that state actions which restrict fundamental rights or which distinguish between individuals solely on the basis of race are regarded as inherently suspect and subject to strict judicial scrutiny. *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 16-17 (1973). The state action challenged here, however, does not involve a fundamental right. Federal and state courts have uniformly rejected the

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[5] The threshold question raised by the parties is the proper standard of judicial review. Appellants contend the racial quotas are explicit classifications based solely upon race. As such, appellants argue the Plans merit strict judicial scrutiny and accordingly cannot be justified in the absence of a compelling state interest. Appellees contend the appropriate standard of review is whether the assertedly benign discrimination attendant with the racial quotas bears a rational relationship to the legitimate governmental purpose of preventing *de facto* segregation in the public schools. We reject appellees' contention, as well as their further argument that, by characterizing the Plans as *voluntary* affirmative action, the applicable standard of review is less exacting than strict scrutiny. We regard any state action involving racial discrimination, however "benign", as requiring analysis under the strict scrutiny-compelling state interest standard. *See, e.g., University of California Regents v. Bakke,* 438 U.S. 265, 291 (Opinion of Powell, J.), 357 (Opinion of Brennan, White, Marshall, Blackmun, JJ.) (1978).

contention of a constitutional right to attend a particular school. *See, e.g., McDaniel* v. *Barresi,* 402 U.S. 39 (1971); *Norwalk C.O.R.E.* v. *Norwalk Board of Education,* 423 F.2d 121 (2d Cir. 1970); *Allen* v. *Asheville City Board of Education,* 434 F.2d 902, 905 (4th Cir. 1970); *Moss* v. *Stamford Board of Education,* 356 F.Supp. 675 (D.C. Conn. 1973); *People ex rel. Altman* v. *Board of Education of the City of Chicago,* 90 Ill. App.2d 21, 30, 234 N.E.2d 362, 366 (1967); *Citizens Against Busing* v. *Palmason,* 80 Wash.2d 445, 495 P.2d 657 (1972).

But there is no question that the challenged desegration plan rests solely upon distinctions according to race. Therefore, if the Plans are to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate, *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967), and even then, only if no less restrictive alternative is available. *See, e.g., San Antonio Independent School District* v. *Rodriguez, supra; Dunn* v. *Blumstein,* 405 U.S. 330 (1972).

Guided by these principles, we proceed to an examination of the merits of the arguments advanced by the appellants in support of their contention that the Plans are violative of the Fourteenth Amendment. First, appellants contend the Board failed to establish the requisite compelling state interest to justify the imposition of racial quotas in connection with the Plans. The record in these cases plainly refutes this contention. The Board's articulated purpose for the adoption of the Plans was the alleviation of overcrowding and the prevention of *de facto* segregation at Gage Park and Morgan Park High Schools. We find the state interest in promoting integration in these two high schools and communities, while at the same time

affording all students residing in these attendance areas a viable opportunity to attend high school in an integrated setting, to be compelling.

Second, appellants argue that the Board failed to show that the racial quotas were necessary to achieve the state interest in preventing the racial segregation of Gage Park or Morgan Park High Schools. This assertion is similarly unsupported by the record. It had been the Board's experience that, where no stabilization quota plans were instituted, schools situated in rapidly changing residential neighborhoods had become racially segregated. For example, Fenger High School, which adjoins the Morgan Park attendance area on the east, went from white enrollment of 46% to 1% during the period from 1970-1975. The Gage Park and Morgan Park attendance areas had been undergoing an accelerated change in residential occupancy from white to black and, while these high schools were still integrated at the time the Plans were instituted, their enrollments were rapidly becoming predominantly black. Accordingly, the Plans were designed to stabilize the integrated character of Gage Park and Morgan Park High Schools and to prevent their enrollment from becoming segregated. The district court found the Plans successfully arrested the segregative impact of population change in the attendance areas of these two high schools.

Thus, the legitimacy of the racial quotas imposed in connection with this voluntary desegregation plan turns upon a determination of whether the Board may properly consider the unpleasant realities of demographic change and the phenomenon of "white flight" when it seeks to preserve integration in the public schools.

It is clear that the prospect of white flight and consequent resegregation cannot justify failure to comply with a court decree ordering integration. *Monroe* v. *Board of*

Commissioners of the City of Jackson, 391 U.S. 450, 459 (1968); *United States* v. *Scotland Neck City Board of Education,* 407 U.S. 484, 490-491 (1972). But we regard these cases as inapposite to the factual setting in this case. Both *Monroe* and *Scotland Neck* involved resistance to a judicial order to desegregate, and the circumstances in each case revealed that the motivating concern with respect to white flight was not the preservation of integration, but the interests of white students seeking to accommodate their own prejudice—the disinclination to attend school with black students. In this case, there is no basis in the record to support the contention that the racial quotas imposed were intended to retard integration and to create racial imbalance at these two high schools. On the contrary, it is evident that the Board's voluntary action was motivated by a good faith effort to stabilize the enrollments at Gage Park and Morgan Park High Schools, and to promote integration not only at these two high schools but also at the alternative high schools designated under the Plans.

Moreover, where the existence of white flight is not used as a shield to avoid mandatory desegregation or to perpetuate segregation, federal courts have held that local school authorities may legitimately take into account the phenomenon of white flight in formulating voluntary programs designed to achieve integration. *See, e.g., Higgins* v. *Board of Education of the City of Grand Rapids,* 508 F.2d 779, 794 (6th Cir. 1974); *Parent Association of Andrew Jackson High School* v. *Ambach,* 598 F.2d 705, 720 (2d Cir. 1979).

Contrary to the appellants' contention, the record in these cases documents the existence of white flight from these two high schools. Although more white students than black students resided in the Morgan Park and Gage Park attendance areas, white enrollments in these schools were declining while black enrollments were increasing.

The difference between the numbers of white students eligible to enroll at these high schools and those actually admitted is attributable to the fact that white students were enrolling in parochial schools serving these attendance areas.

The Supreme Court has recognized that "substantial benefits flow to both whites and blacks from interracial association . . . ." *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, 94-95 (1977), and those benefits cannot be achieved in the public schools unless a school board may consider steps to resist racial segregation. The record in these cases substantiates the emerging patterns of population change and the concomitant phenomenon of white flight in the Gage Park and Morgan Park communities. This phenomenon cannot be ignored in any meaningful effort to preserve integration at the public high schools serving these communities. The exodus of white children from the public schools would disadvantage the entire community and would imperil the success of this voluntary desegregation plan. In light of these realities, we are persuaded that considerations of race, and in particular, racial quotas, are a necessary means of arresting *de facto* segregation in the public schools. Indeed, in fashioning a school desegregation remedy, race must inevitably be taken into account. In *McDaniel* v. *Barresi,* 402 U.S. 39 (1971), involving the busing of black students to other than their neighborhood schools, the Supreme Court declared:

> "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race'. . . . Any other approach would freeze the status quo that is the very target of all desegregation processes."

402 U.S. at 41 (citations omitted). Thus, in the limited circumstances of voluntary affirmative action, and in the absence of an invidious or pernicious intent attributable

to the Board, we conclude that the Board was entitled to consider the probability of white flight in formulating a remedial plan to prevent *de facto* segregation in the public schools.

We are aware of no persuasive authority to the contrary. Appellants rely on the prior decision of this Court in *Lawlor* v. *Board of Education of the City of Chicago,* 458 F.2d 660 (7th Cir. 1972), *cert. denied,* 413 U.S. 921 (1973), as support for their contention that the racial quotas violate the strictures of the Fourteenth Amendment. In *Lawlor,* plaintiffs, who were parents of white students residing in the O'Toole Elementary School attendance area, brought a civil rights action under 42 U.S.C. § 1983 alleging that the administrative practices and policies of the Chicago Board of Education resulted in the denial of due process and equal protection of law by permitting too many black students to attend the O'Toole Elementary School, and that such conduct was causing the departure of white students and would result in the O'Toole attendance area becoming increasingly black. Plaintiffs sought a judicial declaration to that effect, and an injunction which would limit to a range of 10% to 25% the number of black students enrolled in the O'Toole area schools. In affirming the district court's dismissal of the complaint for failure to state a claim, we held that plaintiffs had no constitutional right and the Board had no constitutional duty to establish a particular racial balance.

The contention that appellants in the instant case have a constitutional *right* to demand that a school have a particular racial balance was rejected in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 24 (1971). Moreover, the absence of a constitutional *duty* on the part of the school authorities to establishing racially-based enrollments does not preclude the Board

from prescribing a racial balance to remedy the segregative impact of demographic change. We therefore find appellants' reliance on *Lawlor* to be misplaced.

Nor do we regard the decision in *University of California Regents* v. *Bakke,* 438 U.S. 265 (1978), rendered subsequent to the district court's decision in this case, as requiring reversal. Clearly, the Plans do not suffer from the constitutional infirmity which the majority of the Supreme Court found existing in the total exclusionary admissions program in *Bakke.* The opinion of Mr. Justice Powell (Brennan, White, Marshall, and Blackmun, JJ., concurring) noted that the position of Allan Bakke, who may have been deprived altogether of a medical education, was wholly dissimilar to that of students who are bused from their neighborhood schools to a comparable school for integration purposes. *Bakke, supra* at 300, n.39. Thus, unlike the admission program in *Bakke,* race is not used under the Board's Plans as the basis for distributing a limited number of spaces among a large number of applicants. Appellants, unlike Allan Bakke, are not excluded from attending school by the racial quotas imposed in this case. Rather, the stabilization quotas established for students living in the Gage Park and Morgan Park attendance area merely involved the reassignment of students, each of whom has been afforded a viable opportunity to attend an integrated high school either at Gage Park or Morgan Park, which have been racially stabilized by the Plans, or at one of the 10 alternative integrated high schools which provide a guarantee of enrollment and bus transportation to facilitate attendance.

Accordingly, in view of the findings on the record of the existence of white flight and the compelling state interest in promoting integration, we hold that voluntary state action directed toward the prevention of *de facto* segrega-

tion in the public schools is constitutionally permissible where, as here, the racial quotas imposed in connection with the desegregation plan provide all students residing in the attendance areas with a meaningful opportunity to attend an integrated high school.

C

As an independent basis for finding a violation of the equal protection clause, the appellants contend the Board failed to establish that the objective of preventing *de facto* segregation in the public schools could not be achieved by less discriminatory alternatives. Appellants argue in this connection that the racial quotas operated to devolve upon minority students the entire burden of desegregation, since only minority students were excluded from attending Morgan Park and Gage Park High Schools.

It is true that no white student was ever denied admission to Gage Park or Morgan Park High Schools under the Plans. But it is also true that white students enrolled in these high schools were precluded from transferring to another school until the quota for white students had been exceeded and that when the white enrollment exceeded the established quotas they also would be denied admission. Thus, the implementation of the racial quotas resulted in the exclusion of minority students only because the Plans were designed to address the practical problem of the exodus of white students from Gage Park and Morgan Park, and not because of any inherent inequity in the Plans themselves. Indeed, the racial quotas established for each high school permitted more minority students than white students to enroll, even though the white student population exceeded the nonwhite student population residing in the attendance areas serving these schools.

As the district court found, the racial balance at Gage Park is 58.2% nonwhite and 41.9% white, and the racial balance achieved at Morgan Park is 59% nonwhite and 41% white.

The appellants have advanced alternative proposals which they claim would preserve integrated student bodies at Gage Park and Morgan Park High Schools in a less discriminatory fashion. We are not persuaded, however, that these alternatives offer a viable means of preventing *de facto* segregation at these two high schools. Moreover, we regard the mechanics of integration, particularly in the circumstances of voluntary remedial action, where the purpose is obviously to implement the promise of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and effectively achieves that objective, to be ordinarily a matter within the discretion of local school authorities.

Accordingly, in view of the compelling state interest in preventing *de facto* school segregation, the realities of population change, and the discretion accorded to local school authorities in fashioning desegregation remedies, we perceive no invidious discrimination in the Board's modified stabilization quota plans, which successfully arrested the segregative impact of demographic change and preserved the integrated character of the enrollments at Gage Park and Morgan Park High Schools.

IV

Appellants also appeal from the judgment entered upon the district court order denying their petition for attorneys fees, contending they were entitled to such fees under the Emergency School Aid Act, 20 U.S.C. §§ 1601 *et seq.*, and under the Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988. We are unpersuaded by the arguments

advanced in support of this contention, and therefore conclude that the district court properly denied the requests for attorneys fees.

An award of attorneys fees under the statutes relied upon by the appellants is predicated upon the express condition precedent that the petitioner be a prevailing party, and even then, fees may only be awarded upon the exercise of the court's discretion. Title 20 U.S.C. § 1617; Title 42 U.S.C. § 1988. It is patently clear from the record that the appellants were not the prevailing parties in these proceedings. The relief sought by their complaints was the abolition of the Board's Student Racial Stabilization Quota Plans instituted at Gage Park and Morgan Park High Schools. Since the district court upheld the Plans as constitutional, it cannot be said that the appellants prevailed on the merits of their complaints.

Moreover, even assuming *arguendo* that appellants "prevailed" in the sense that these actions resulted in the modification of the Plans to provide bus transportation to alternative schools for students denied admission to Gage Park and Morgan Park High Schools, there is no basis in the record for concluding that the district court abused its discretion in denying appellants' petition for attorneys fees.

For the foregoing reasons, the judgments appealed from are affirmed and the Clerk of this Court is directed to enter judgment accordingly.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Court of Appeals Order Denying Rehearing

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
December 6, 1979.

Before

Hon. Latham Castle, Senior Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

KATHY SUE JOHNSON, et al.,

Plaintiffs-Appellants,

No. 78-1215 vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants-Appellees.

and

DARCEL MILTON, et al.,

Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendants-Appellees.

On Petition for Rehearing and Suggestion for Rehearing *En Banc.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the Plaintiffs-Appellants, no judge in active service has requested a vote thereon,* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Hon. Walter J. Cummings and the Hon. Robert A. Sprecher did not participate in any consideration of the petition for rehearing *en banc*.

Appendix C

Judgment Order of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KATHY SUE JOHNSON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

and

DARCEL MILTON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

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76 C 995 and 76 C 996 (Consolidated)

JUDGMENT ORDER

These actions having come on for trial by the Court, without a jury, and the issues having been duly heard, a decision having been duly rendered, and the Court having made its findings of fact and having stated its conclusions of law,

IT IS ORDERED AND ADJUDGED:

1. That defendants Board of Education of the City of Chicago, *et al.*, their successors, and any others acting in concert with any of them, be and hereby are permanently enjoined and prohibited from adopting, maintaining, or implementing any admissions or racial quota plan for Morgan Park or Gage Park High School which excludes black or Hispanic students, without providing them with an opportunity to attend an integrated general high school in the Chicago public school system which is equivalent to the opportunity provided by Board Report No. 77-212-16 (Revised), as modified by this Court's order of August 12, 1977.

2. That plaintiffs recover of defendant, Board of Education of the City of Chicago, their costs herein.

3. That a ruling on plaintiffs' petition for attorneys' fees shall be and is reserved.

DATED at Chicago, Illinois, this 30th day of December, 1977.

/s/ *Hubert L. Will*
United States District Judge

APPENDIX D

Findings of Fact and Conclusions of Law by the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KATHY SUE JOHNSON, et al.,

Plaintiffs,

v.

BOARD OF EDUCATION OF THE
CITY OF CHICAGO, et al.,

Defendants.

DARCEL MILTON, et al.,

Plaintiffs,

v.

BOARD OF EDUCATION OF THE
CITY OF CHICAGO, et al.,

Defendants.

No. 75 C 995 and No. 75 C 996 — Consolidated

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

These actions having come on for trial by the Court, without a jury, on plaintiffs' complaints, and on defendants' answers thereto, and the parties having stipulated to certain facts by means of a pretrial order entered herein on May 23, 1977 and a First Amendment thereto entered herein on July 29, 1977, and additional evidence submitted by and on behalf of the parties having been made a part

of the record herein, and the Court having heard the arguments of counsel with respect thereto, the Court, pursuant to Rule 52, Fed.R.Civ.P., hereby finds the facts and states its conclusions of law as follows:

Findings of Fact

1. Morgan Park High School, 1744 W. Pryor Avenue (11200 South), Chicago, and Gage Park High School, 5630 S. Rockwell Avenue (2600 West), Chicago, are public high schools owned and operated by the Board of Education of the City of Chicago.

2. Plaintiffs in *Johnson* v. *Board of Education* are black children who reside in the Morgan Park attendance area, and their parents. Plaintiffs in *Milton* v. *Board of Education* are black children who reside in the Gage Park attendance area, and their parents. But for the "student racial stabilization plans" freezing enrollment and establishing racial quotas instituted and applied by defendant Chicago Board of Education, all eighth-grade students residing in the Gage Park or Morgan Park attendance areas would have been offered the opportunity to attend Gage Park or Morgan Park High School.

3. In 1975, Gage Park High School was approximately 41% white and 59% minority, while Morgan Park High School was 37% white and 63% minority. The comparable figures for 1976 are 42% white and 58% minority for Gage Park and 38% white and 62% minority for Morgan Park. Black children attending Gage Park and Morgan Park are thus attending school in an integrated setting.

4. The Morgan Park High School and Gage Park High School attendance areas were in part undergoing accelerated racial change from white to black in 1975-1976. The schools were also over capacity because of increasing enrollment.

5. During the period from 1972 to 1975, black student enrollment at Morgan Park had increased from 52.3% to 62.3% and white student enrollment had declined from 45.7% to 36.9%. In this same period, total enrollment increased from 3092 to 3423. As of January 30, 1976, enrollment at Morgan Park High School was 3323 and the school was operating at 128.6% of capacity of permanent facilities. The racial composition of all students attending public and non-public elementary schools residing in the Morgan Park attendance area in 1976 was 6842 black, 7312 white, and 144 other.

6. During the period from 1972 to 1974, black student enrollment at Gage Park had increased from 1056 to 1361. As of January 30, 1976, enrollment at Gage Park High was 2441 and the school was operating at 106% of capacity. The racial composition of all students attending public and non-public elementary schools residing in the Gage Park attendance area in 1975 was 5235 black, 8617 white, 1174 Hispanic and 110 other.

7. On May 14, 1975, the Board of Education of the City of Chicago adopted a student racial stabilization plan establishing a ceiling on enrollment and a racial quota with respect to admissions to Gage Park High School. Under this quota plan, the racial composition of Gage Park High School was to be 48% black, 42% white, 8% Hispanic and 2% principal's option with the selection of incoming freshmen students to be made by lottery.

8. The Board adopted an enrollment ceiling and racial stabilization quota plan for Morgan Park High School on March 10, 1976, that differs in two respects from that applied to Gage Park. The Morgan Park plan set a 50% white and 50% black quota with respect to each entering class, rather than the school as a whole. In addition, the Morgan Park quota plan provides for the admission of a

maximum of 350 black students even if less than 350 white students apply. By contrast, the Gage Park plan admits black students to the extent that sufficient numbers of white students are in attendance so that the requisite overall 48 to 42 black-to-white ratio can be maintained.

9. The first lottery, in preparation for the 1975 school year at Gage Park High School, was held on June 2, 1975. Since the racial percentages were to be applicable to the school as a whole rather than to the incoming class, the entering class at Gage Park in September 1975 was in actual fact 43% white (267/615), 42% black (259/615) and 14% Hispanic (85/615).

10. The Gage Park racial quota plan was also applied to the class entering Gage Park High School in September 1976, with the applicable lottery drawing held on January 19, 1976. The entering class in 1976 as determined by the drawing was 44% white (229/519), 43% black (224/519) and 12% Hispanic (61/519).

11. A student racial/ethnic survey dated October 29, 1976, and conducted by the Board of Education, shows that the entering freshman class of September 1976 at Gage Park was in fact 42.6% white (228/535), 45.4% black (243/535) and 11.4% Hispanic (61/535). In 1975 and 1976, all freshmen attended the Gage Park High School "branch," which is on the same campus as Gage Park High School, is part of the permanent facility, and is used for freshmen only.

12. The Board's stated purpose for adoption of the racial quotas was to prevent overcrowding and to prevent Gage Park and Morgan Park High Schools from becoming increasingly black. Consequently, the quota for admission of black students at each school was necessarily set at a lower level than that at which black students would have applied and been admitted but for the quota.

13. No white student was ever denied admission as a result of the quotas instituted at Gage Park and Morgan Park High Schools, but hundreds of black and Hispanic students have been denied admission annually since the racial quotas were instituted.

14. Under the racial quota plans, separate lottery lists are made for white, black and (in the case of Gage Park) Hispanic students. Students are admitted to Gage Park or Morgan Park High Schools, as the case may be, in the order their names appear on the applicable lottery lists until the quota for their race is filled.

15. The group of students accepted into Gage Park for the September 1975 school year included all those names down to a red line on the lottery list for each race. The red line appears immediately below the last name on the white list, No. 289. By contrast, the red line appears below name No. 200 on the black list, which has a total of 498 names, indicating the exclusion as of that date of 298 black applicants.

16. Within two weeks thereafter, an additional 60 black elementary students were given the option to enroll into Gage Park High School. By October 1, 1975, all of the original 498 black students had been offered the option of enrolling in Gage Park High School. Another 212 black students, who applied for admission after the lottery of June 2, 1975, were not offered the option of enrolling into Gage Park High School. Each of the 136 additional white students applying for admission after June 2, 1975 was admitted.

17. With respect to the January 1976 Gage Park drawing for the September 1976 school year, a red line again appears immediately below the last name on the white list, No. 309. By contrast, the red line appears below name No. 300 on the black list, which has a total of 626

names, indicating the exclusion at the time of the drawing of 326 black applicants.

18. With respect to the Gage Park lottery for the September 1976 school year, all 309 white students included in the January 19, 1976 drawing, and all 181 white students applying thereafter were offered the opportunity to enroll at the time of the lottery drawing or at the time they applied. Of the 626 black students included in the lottery drawing and the 210 additional black students applying thereafter, 300 black students were permitted to enroll and 243 actually attended Gage Park High School. At least 411 black students were excluded from Gage Park High School as of October 12, 1976 as a result of the racial quota.

19. The lottery to determine September 1976 admissions to Morgan Park High School was held on April 30, 1976. As of October 29, 1976, 538 black and 490 non-black students were eligible to apply to the 1976 freshman class. As of May 10, 1976, ten days after the drawing, every white student but one was offered the option to enroll in Morgan Park. The highest lottery number offered the option to enroll of 484. The one exception was Arlene Mickley, who apparently was never assigned a lottery number, and who was notified of her admission to Morgan Park on May 11, 1976. An additional 33 white students applying as transfer students thereafter were also admitted to Morgan Park High School.

20. In the 1976 Morgan Park lottery, as of May 10, 1976, 350 black students were offered the option to enroll in Morgan Park, the option to enroll with the highest lottery number then offered being No. 368. One hundred and thirty-one (131) black students were denied admission as of that date. As of October 29, 1976, the number of black students denied admission was 126, which included 15 black transfer students. No white student was ever denied ad-

mission to Morgan Park as a result of the 1976 lottery. The number of students actually admitted to Morgan Park High School as freshmen in September 1976 (as of October 29, 1976) was 350 black and 272 non-black.

21. Students denied admission as a result of the racial quotas are placed on a "waiting list," and are offered the opportunity to attend Morgan Park or Gage Park High Schools in the event another student of the same race, previously admitted to the school, elects not to attend, and with respect to Gage Park High School, if additional white students elect to attend so that additional black students may be admitted and still maintain the prescribed racial balance.

22. With respect to the Morgan Park lottery, 33 of the black students on the waiting list were offered the opportunity to enroll on or after September 27, 1976 (some as late as October 13, 1976), several weeks after the beginning of school. A number of such students, who were attending other schools at that time, declined the opportunity to transfer to Morgan Park.

23. At the time the student racial stabilization quota plans were adopted, there were substantially more white students than black students in public and non-public elementary schools in the Morgan Park and Gage Park attendance areas. However, it became apparent after the plans were in operation that the number of white students seeking admission at each high school was less than the quota set for white students and that the number of blacks and Hispanic students applying exceeded the quotas for those groups.

24. Students denied admission as a result of the racial quota plans as originally adopted by the Board were permitted to attend any "under-utilized" Chicago public high school. These under-utilized schools are the same schools

which under the provisions of Board Report No. 75-494-10 (adopted April 30, 1975), a Permissive Transfer Program, every child attending an over-utilized high school in the City of Chicago (which includes Gage Park and Morgan Park High Schools) was given the option of attending. Thus, under this Program, prior to and irrespective of the racial quota plans, Gage Park and Morgan Park High School students could have elected to attend these under-utilized schools.

25. Until the Board adopted a revised voluntary transfer program in July 1977, as described in Finding No. 39, excluded students residing in the Morgan Park and Gage Park attendance areas were required to travel to alternative schools using public transportation. Carfare was provided to students excluded from Gage Park High School commencing in September or October 1976, and for students excluded from Morgan Park High School from the inception of the racial quota for that school.

26. These plans were attempts on the part of the Board to relieve overcrowding and to promote integration in schools situated in rapidly changing neighborhoods. Experience has shown that the Board has achieved both objectives at each school. The racial balance at Gage Park High School is 45.4% black, 41.9% white, 12.7% other, and the racial balance at Morgan Park High School is 59% black and 41% white. The enrollment at Gage Park has been reduced to 2102 and the school is operating at 91.3% of capacity. The Morgan Park enrollment has been reduced to 2613 and the school is operating at 101.2% of capacity.

27. The following is the racial composition of the eighteen general high schools listed as available to those denied admission as a result of the racial quotas:

School	1975 Racial %			1976 Racial %		
Mather	93.0W;	1.4B;	1.7H	89.6W;	1.2B;	2.9H
Roosevelt	77.9W;	6.0B;	9.7H	76.0W;	2.7B;	12.6H
Sullivan	77.2W;	7.0B;	8.3H	73.4W;	8.2B;	8.8H
Von Steuben	67.8W;	10.3B;	14.2H	63.2W;	7.4B;	18.4H
Lake View	47.3W;	2.6B;	44.8H	43.6W;	3.3B;	47.1H
Senn	47.3W;	15.7B;	22.6H	44.0W;	15.3B;	24.3H
Kenwood	26.6W;	66.3B;	2.8H	26.4W;	66.7B;	2.8H
Wells	18.6W;	23.0B;	57.5H	16.3W;	23.7B;	59.5H
Tilden	11.6W;	75.7B;	12.6H	11.1W;	76.8B;	11.8H
Waller	10.2W;	70.2B;	17.9H	9.1W;	72.3B;	17.4H
Harrison	5.0W;	59.8B;	35.0H	5.1W;	42.4B;	52.2H
Farragut	2.2W;	82.9B;	14.8H	1.5W;	83.4B;	15.1H
Manley	0W;	99.9B;	.1H	0W;	99.9B;	0H
Marshall	0W;	100.0B;	0H	0W;	100.0B;	0H
Crane	0W;	99.9B;	.1H	0W;	99.8B;	.2H
DuSable	0W;	100.0B;	0H	0W;	100.0B;	0H
Hyde Park	0W;	100.0B;	0H	0W;	99.7B;	.3H
Carver	0W;	100.0B;	0H	0W;	100.0B;	0H

28. Of these eighteen under-utilized schools, six have significant white enrollments. These are Roosevelt (78%/76% white in 1975/1976), Von Steuben (68%/63% white), Mather (93%/90% white), Sullivan (77%/73% white), Lakeview (47%/44% white) and Senn (47%/44% white). These schools are located on the north side of the City of Chicago. None is south of 4000 North and three are north of 5800 North. By contrast, Gage Park High School is located at 5600 South and Morgan Park is at 11200 South. The closest of these schools (Lakeview) is 11.4 miles from Gage Park and 18.15 miles from Morgan Park High School.

29. Travel to the schools listed in Finding No. 27 from Gage Park or Morgan Park High Schools involves (1) taking a bus to the Dan Ryan rapid transit line; (2) transferring from the Dan Ryan to the Howard or Ravenswood rapid transit lines; (3) travel on the Howard or Ravenswood rapid transit lines and, in two instances, (4) an additional bus trip to the school.

30. The following is a table of schools attended by 317 of the 416 black students excluded as a result of the 1975 Gage Park lottery. Data with respect to the 99 additional black students is not readily available:

Schools attended by 317 black students excluded from Gage Park under 1975 racial quota

Harper	0W;	99.9B;	0H	139
Hyde Park	0W;	100B;	0H	31
Dunbar	0W;	99.6B;	0H	23
Englewood	0W;	99.9B;	0H	18
King	0W;	100B;	0H	17
DuSable	0W;	100B;	0H	13
C.V.S.	0W;	99.8B;	.2H	8
South Shore	.1W;	99.5B;	.3H	7
Lindblom	.1W;	97.2B;	.1H	7
Crane	0W;	99.9B;	.1H	6
Tilden	11.6W;	75.7B;	12.6H	5
Calumet	0W;	99.9B;	0H	4
Hubbard	93.9W;	0B;	3.9H	4
Farragut	2.2W;	82.9B;	14.8H	3
Harrison	5.0W;	59.8B;	35.0H	3
Curie	77.8W;	16.8B;	5.8H	3
Parker	0W;	99.8B;	.2H	3
Hirsch	0W;	99.6B;	.3H	3
Austin	.2W;	99.6B;	.2H	2
Phillips	.1W;	99.9B;	0H	2
Harlan	.1W;	99.9B;	0H	2
Fenger	1.2W;	96.7B;	2.0H	2
Julian	.2W;	99.7B;	.1H	1
Tubman Fam.Lvg Ctr	0W;	100B;	0H	1
Manley	0W;	99.9B;	.1H	1
Moseley Soc.Adj.Sch.	0W;	89.8B;	10.2H	1
Bousfield Soc.Adj.Sch.	0W;	100B;	0H	1
Orr	5.0W;	78.6B;	15.9H	1
Jones Commercial	10.6W;	62.6B;	22.8H	1
Waller	10.2W;	70.2B;	17.9H	1
Metro	46.7W;	45.6B;	4.6H	1
Young	34.0W;	44.5B;	15.9H	1
Schurz	78.3W;	1.4B;	18.8H	1
Kelly	82.7W;	.1B;	16.7H	1
			TOTAL	317

31. The following is a list of schools attended by students excluded as a result of the 1976 Gage Park lottery:

Schools attended by those excluded from Gage Park under 1976 quota

Hyde Park	0W;	99.7B;	.3H	90
DuSable	0W;	100B;	0H	73
Collins	.1W;	98.8B;	1.1H	65
Harper	0W;	99.9B;	0H	61
Dunbar	0W;	99.5B;	.4H	37
Harrison	5.1W;	42.4B;	52.2H	34
Lindblom	.1W;	99.7B;	.2H	33
Tilden	11.1W;	76.8B;	11.8H	33
Kenwood	26.4W;	66.7B;	2.8H	25
Simeon	0W;	100B;	0H	23
C.V.S.	.5W;	99.1B;	.4H	14
Englewood	0W;	99.8B;	.2H	9
Curie	75.7W;	17.2B;	6.5H	7
Calumet	0W;	99.6B;	.4H	5
Parker	0W;	100B;	0H	5
King	0W;	100B;	0H	4
Colley	0W;	99.8B;	.2H	3
Phillips	0W;	99.9B;	0H	3
Jones Commercial	7.4W;	70.6B;	21.5H	3
Austin	.1W;	99.7B;	.1H	2
Corliss	0W;	99.9B;	.1H	1
Crane	0W;	99.8B;	.2H	1
Harlan	0W;	99.9B;	0H	1
Hirsch	0W;	99.6B;	.3H	1
Westinghouse	0W;	100B;	0H	1
Orr	3.7W;	79.7B;	16.5H	1
Waller	9.1W;	46.7B;	6.0H	1
Young	28.9W;	52.7B;	14.7H	1
Kelly	78.1W;	.1B;	21.2H	1
Prosser	73.2W;	10.8B;	14.1H	1
			TOTAL	539

32. As of September 20, 1976, 193 black students had been excluded as a result of the 1976 Morgan Park racial quota. Two of these students attended Kenwood (27%/26% white), while the remaining 191 attended schools which were over 99% minority. Nearly all the excluded students not attending a special technical or vocational high school (110 of 117 students) attended Carver High School, the closest under-utilized school to Morgan Park.

33. Students excluded from Gage Park and Morgan Park High Schools as a result of the 1975 and 1976 racial quota plans were permitted to attend only under-utilized schools, with "under-utilized" defined to mean a school with a total student enrollment below "the city-wide percent of capacity" of 101.3%.

34. In 1975, 22 of 51 general high schools were above the level of 101.3% utilization (excluding so-called "temporary facilities"). In 1976, 29 of 51 general high schools were above that level.

35. As a consequence of the criteria limiting black students excluded from Morgan Park and Gage Park High Schools to "under-utilized" schools—*i.e.*, schools with total enrollments below 101.3% (Finding No. 33)—such students were not permitted to attend any of the following schools: Kelly (82.7%/78.1% white; 138.5%/141.5% utilization); Kennedy (89.8%/89.0% white; 127.7%/110.4% utilization); Bogan (99.2%/97.4% white; 130.4%/126.6% utilization); Hubbard (93.9%/93.4% white; 127.3%/110.1% utilization); Washington (94.3%/93.3% white; 119.6%/115.8% utilization); Amundsen (83.4%/80.1% white; 104.2%/108.5% utilization [1975/76]); Foreman (95.7%/95.2% white; 127.8%/127.4% utilization); Kelvyn Park (65.4%/58.2% white; 118.6%/126.1% utilization); Schurz (78.6%/75.3% white, 101.3%/103.9% utilization); or Steinmetz (92.5%/

90.9% white, 116.4%/115.9% utilization). Some of these schools are more accessible to excluded Gage Park and Morgan Park students' homes than the white or integrated "under-utilized" schools which have been made available to them.

36. On January 21, 1977, a lottery drawing was held for the September 1977 freshman class in Gage Park High School. Of 754 black children in the lottery drawing, 425 were accepted as enrollees and 329 were denied admission. Of 85 Hispanic students, 30 were accepted and 50 were denied admission. Not one of the 364 white students who applied was denied admission.

37. On February 3, 1977, a lottery drawing was held for the September 1977 freshman class in Morgan Park High School. Six hundred ten white students and 612 black students had their names included in the lottery drawing. In April 1977, each white child who wished to attend Morgan Park High School was notified of his admission; the total number admitted was 317. At the same time, 350 black children were notified of their admission, and 157 black children who wished to attend the school were excluded.

38. On June 29, 1977, this case came on for trial, plaintiffs appearing with their witnesses. At that time counsel for the Board indicated that a modification of the racial quotas was being proposed to the Board of Education and that the Board would waive its right to present any evidence not already in the record. The Board also stipulated to certain additional facts, and both sides rested. The Court then stated that it was prepared to find the racial quotas as originally adopted to be unconstitutional, but would reserve final ruling pending any modification the Board might wish to present.

39. On July 13, 1977, the Board of Education adopted Board Report No. 77-212-16 (Revised), which modified the Gage Park and Morgan Park racial quota plans by providing excluded black and Hispanic students the option of attending certain North Side predominantly white and integrated schools by means of bus transportation provided by the Board of Education.

40. The following schools were made available to excluded Gage Park and Morgan Park black children under Board Report No. 77-212-16 (Revised):

Receiving School	No. of students who may transfer from Gage Park High School attendance area	No. of students who may transfer Morgan Park High School attendance area
Roosevelt	130	50
Taft	50	—
Von Steuben	92	50
Mather	100	50
Sullivan	100	50
Curie	50	50
Lane Technical	100	50
Schurz	150	40
Senn	200	—
Lake View	140	50
	150*	
TOTAL:	1,262	390

* Places originally designated for Metropolitan High School.

41. By this Court's order of August 12, 1977, the Board was directed to implement procedures for publicity and student counseling with respect to the alternatives provided by Board Report No. 77-212-16 (Revised), and to provide that designated places at the alternative schools which were not filled by students excluded from one school

(*e.g.*, Morgan Park) would be made available to students excluded from the other school (*e.g.*, Gage Park).

42. As of October 12, 1977, 102 of the 1632 students excluded as a result of the Morgan Park and Gage Park racial quotas had availed themselves of the opportunity provided by Board Report No. 77-212-16 (Revised). The following is the number of students attending each alternative school:

PARTICIPATING STUDENTS FROM MORGAN PARK AREA

Receiving School	Number of Buses	Number of Passengers	Bus Cost Per Day
Von Steuben)	1	32	
Lane)		3	$120
Roosevelt	1	23	120
Curie	1	10	120
Subtotals:	3	68	$360

PARTICIPATING STUDENTS FROM GAGE PARK AREA

Curie	2	9	$ 240
Roosevelt)			
Von Steuben)	1	8	120
Lane)	1	1	
Lake View)		16	120
Subtotal:	4	34	$ 480
TOTALS:	7 Buses	102 Students	
COSTS:	Bus Cost		$ 840
	Aides		174
			$1014 per day

Cost per student per day: $9.94.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter hereof by reason of 28 U.S.C. §§ 1331, 1343 and 2201, and 20 U.S.C. § 1706.

2. The defendant Board of Education of the City of Chicago is a body politic and corporate, and an agency of the State of Illinois, and may be sued as such.

3. The racial quota as originally adopted by the defendant Board deprived at least some of the plaintiffs of their rights under the Constitution of the United States and their rights under 42 U.S.C. §§ 1981 and 1983 and 20 U.S.C. § 1703(c), in that they did not give excluded students a viable opportunity to attend other integrated schools.

4. Those plaintiffs who were adversely and unlawfully affected by the racial quota plans as originally adopted were made to suffer irreparable injury for which there was no adequate remedy at law.

5. The so-called "voluntary transfer" plan adopted by the Board on July 13, 1977 as subsequently modified, restored to those plaintiffs who were adversely and unlawfully affected by the racial quota plans their rights under the Constitution of the United States and under 42 U.S.C. §§ 1981 and 1983 and 20 U.S.C. § 1703(c), in that under said voluntary transfer plan there was made available to such plaintiffs a meaningful opportunity to attend a Chicago public high school in an integrated setting.

6. The aforesaid voluntary transfer plan was adopted by the Board only after plaintiffs had filed their complaints herein, engaged in substantial discovery, and had answered ready for trial on the merits, and only after said trial was commenced and the Court indicated that it was prepared to find the racial quota plans as originally adopted to be unconstitutional, and said voluntary transfer plan would not

have been adopted but for the efforts of plaintiffs and their counsel.

7. Plaintiffs and others similarly situated would suffer irreparable injury if the voluntary transfer plan, adopted by the Board as a result of the instant suit, were modified or abandoned.

8. It is desirable and appropriate that the Board continue in this way and to that end the Board of Education will be enjoined to maintain and continue said plans, as modified, incorporating provisions for the voluntary busing of excluded students living in the Morgan Park or Gage Park areas to alternative integrated public high schools.

9. A permanent injunction will issue directing or requiring defendants to maintain and continue a transfer plan equivalent to the plan set forth in Board Report No. 77-212-16 (Revised).

10. Plaintiffs are entitled to recover their costs herein.

11. The Court reserves ruling on plaintiffs' petition for attorneys fees.

DATED at Chicago, Illinois, this 30th day of December, 1977.

/s/ *Hubert L. Will*
United States District Judge

APPENDIX E

Order of the District Court on Attorneys Fees

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KATHY SUE JOHNSON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

and

DARCEL MILTON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

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76 C 995 and 76 C 996 (Consolidated)

ORDER

Whereas plaintiffs have filed a Petition for costs and attorneys' fees, and the Court having considered said Petition and the submissions of the parties in connection therewith,

IT IS ORDERED THAT

1. Plaintiffs shall recover from defendant Board of Education of the City of Chicago the sum of $908.31, as their costs and out-of-pocket expenses in this matter;

2. Plaintiffs shall recover from defendant Board of Education of the City of Chicago the additional sum of $1,000, as a witness fee for their expert witness, Professor Karl E. Taeuber; and

3. Plaintiffs' Petition for Attorneys' Fees is otherwise hereby denied.

Dated at Chicago, Illinois
this 23rd day of January, 1978.

/s/ *Hubert L. Will*
United States District Judge